

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ZUNUM AERO, INC.,

Plaintiff,

vs.

THE BOEING COMPANY; BOEING  
HORIZONX VENTURES, LLC,

Defendants.

Case No. 2:21-cv-00896-JLR

**DEFENDANTS THE BOEING COMPANY  
AND BOEING HORIZONX VENTURES,  
LLC'S SUPPLEMENTAL TRIAL BRIEF IN  
ADVANCE OF MAY 15, 2024 HEARING**

NOTE ON MOTION CALENDAR: N/A

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In advance of the May 15, 2024 hearing, and pursuant to the Court’s Order at Docket 635, The Boeing Company and Boeing HorizonX Ventures, LLC (together, “Boeing”) hereby submit this Supplemental Trial Brief to address issues subject to the parties’ pretrial meet-and-confer discussions and raised in Zunum’s trial briefing.

**I. Boeing’s Objection to Confidentiality Designations on Trial Exhibits Applied During Litigation**

Almost all trial exhibits appearing on the parties’ exhibits bear confidentiality designations applied during this litigation under the protective order. Boeing seeks removal of all such confidentiality designations from the trial exhibits and is prepared to submit clean copies of all trial exhibits without the confidentiality designations by the morning of May 16, 2024.

Removal of litigation confidentiality designations is a standard practice in trade secrets trials. That is because the plaintiff bears the burden of showing that each alleged trade secret was “the subject of efforts that are reasonable under circumstances to maintain secrecy.” Wash. Rev. Code Ann. § 19.108.010(4)(b). Consequently, litigation confidentiality designations are unduly prejudicial because they are likely to mislead the jury into believing that documents were designated confidential (and thus subject to reasonable protection efforts) at the time of their creation. They should therefore be removed before shown to the jury. *See, e.g., Karma Auto. LLC v. Lordstown Motors Corp.*, 2022 WL 20401205, at \*4 (C.D. Cal. Dec. 12, 2022) (“Markings pursuant to the protective order are both irrelevant and potentially confusing”); *BladeRoom Grp. Ltd. v. Facebook, Inc.*, 2018 WL 1569703, at \*5 (N.D. Cal. Mar. 30, 2018) (“[P]rotective order confidentiality designations are irrelevant, and risk confusing and misleading the jury on the issue of whether Plaintiffs’ took reasonable steps to maintain the confidentiality of their trade secrets.”); *Black v. Wrigley*, 2019 WL 10817216, at \*3 (N.D. Ill. July 11, 2019) (“‘[C]onfidential’ stamps are to be removed from exhibits that will be introduced before the jury, to avoid unnecessary jury confusion.”); *Genesys Cloud Servs., Inc. v. Strahan*, 2023 WL 2187508, at \*12 (S.D. Ind. Feb. 23, 2023) (“Because the confidentiality designations were

created after litigation began, those designations are irrelevant and therefore inadmissible. Even if there was some relevance, any limited probative value of the labels would be outweighed by the severe risk of confusing and misleading the jury”). Litigation-applied confidentiality markings reflect only lawyers’ after-the-fact arguments as to confidentiality and have no relevance as to the document’s actual confidentiality.<sup>1</sup> *See, e.g.*, Dkt. 45 ¶ 9 (“Nothing in this Protective Order shall operate as an admission by the Receiving Party that any particular . . . document or information contains or reflects trade secrets, proprietary, or any other type of confidential matter.”).

Zunum has refused to stipulate to removal of confidentiality designations on two grounds.

*First*, Zunum has argued that a limiting jury instruction regarding confidentiality designations is sufficient to remedy any prejudice. Not so. “[A] limiting instruction would be ineffective to cure this prejudice because such instruction would only draw the jury’s attention to the irrelevant and misleading document designations.” *Genesys Cloud Servs., Inc.*, 2023 WL 2187508, at \*12; *Karma Auto. LLC*, 2022 WL 20401205, at \*4 (“Given the pervasiveness with which the parties self-determined confidential status and so marked documents, an instruction is unlikely to be effective.”). In this case, moreover, various trial exhibits bear confidentiality designations that were created and applied at the time the documents were created (as opposed to during this litigation). Even with a limiting instruction, a significant risk exists that the jury will be unable to differentiate between original confidentiality markings and litigation markings.

*Second*, Zunum has argued that it is impractical to remove the litigation confidentiality designations because the trial is set to begin on May 16. But Boeing is prepared to provide the Court with electronic and printed copies of all stamped exhibits on the exhibit list—Zunum’s and

<sup>1</sup> Zunum cannot argue otherwise. If it were to do so, it would place their own attorneys’ determinations as to confidentiality as fact issues in this case.

Boeing’s—by the morning of May 16. *See also Karma Auto. LLC*, 2022 WL 20401205, at \*4 (C.D. Cal. Dec. 12, 2022) (“The Court highly doubts that Karma will use all of the 1,296 documents which it has identified in its exhibit list . . . . Thus, the burden is largely of the parties’ own making and can be reduced by the parties when they choose what specific documents to actually use at trial.”).

## **II. Boeing’s Objection to Sealing of the Courtroom**

Zunum has indicated that it will seek to seal the courtroom during trial. Boeing objects to any such sealing because Zunum cannot meet its heavy burden to overcome the presumption of public access and any closure of the courtroom would unnecessarily risk prejudicing Boeing.

“One of the most enduring and exceptional aspects of Anglo–American justice is an open public trial. Indeed, ‘throughout its evolution, the trial has been open to all who cared to observe.’” *Phoenix Newspapers, Inc. v. U.S. Dist. Ct. for Dist. of Arizona*, 156 F.3d 940, 946 (9th Cir. 1998). “A party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the ‘compelling reasons’ standard.” *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). “[T]he party must ‘articulate[ ] compelling reasons supported by specific factual findings[.]’” *Id.* “Simply mentioning a general category of privilege, without any further elaboration or any specific linkage with the documents, does not satisfy the burden.” *Id.* Courts will not “close the courtroom, when information central to the parties’ arguments in [the] case is being discussed . . . unless the parties demonstrate the most compelling of reasons and show through persons with direct knowledge why significant harm *would* occur if the information became public.” *Huawei Techs., Co. v. Samsung Elecs. Co.*, 340 F. Supp. 3d 934, 1003 (N.D. Cal. 2018) (emphasis in original); *see also In re Nat’l Consumer Mortg., LLC*, 512 B.R. 639, 642 (D. Nev. 2014) (recognizing that the court “specifically rejected [party’s] request to close the courtroom” (citing *In re Nat’l Consumer Mortg., LLC*, Case No. 2:10–CV–00930–PMP–PAL, Dkt. 333 at 28:23–25 (“[T]hat’s a nonstarter. I mean I’m not going to do that at all. That, frankly, would be offensive to the process



1 . . . .”); *In re Pac. Fertility Ctr. Litig.*, 2021 WL 1082843, at \*2 (N.D. Cal. Mar. 12, 2021) (“the  
 2 Court will not close the courtroom during expert testimony regarding Plaintiffs’ product liability  
 3 claims[]” despite there being sensitive testimony regarding product design).

4 Applying these principles, courts in the Ninth Circuit routinely require that a courtroom  
 5 remain open during trade secrets trials or with respect to trade secrets. *See, e.g., Apple, Inc. v.*  
 6 *Samsung Elecs. Co.*, 2012 WL 3283478, at \*11 (N.D. Cal. Aug. 9, 2012) (in case involving trade  
 7 secrets: “Accordingly, all motions to seal the courtroom during trial or to seal portions of the trial  
 8 transcript are hereby DENIED.”); *Sumotext Corp. v. Zoove, Inc.*, 2020 WL 836737, at \*4 (N.D.  
 9 Cal. Feb. 20, 2020) (although “such [pricing] information ‘falls within the definition of “trade  
 10 secrets,”” declining to seal exhibit and stating that “the courtroom will not be sealed”); *see also,*  
 11 *e.g., Finjan, Inc. v. Sophos, Inc.*, 2016 WL 7911365, at \*2 (N.D. Cal. Aug. 30, 2016) (declining  
 12 to seal courtroom where party sought to maintain confidentiality of licensing agreement; “Trials  
 13 are matters of public record. I will not seal the courtroom during trial”); *In re Qualcomm Litig.*,  
 14 2019 WL 1598928, at \*3 (S.D. Cal. Apr. 15, 2019) (where trade secrets might be disclosed  
 15 during trial: “Repeated requests to close and clear the courtroom would be unduly cumbersome  
 16 to the Court’s interest in managing the trial. Sealing such information would hamstring the  
 17 parties and stymie them from litigating key issues effectively and efficiently. Furthermore, over-  
 18 sealing crucial exhibits would impede the jury and the public’s ability to understand the nature of  
 19 the proceedings and the factual basis for the parties’ claims.”).

20 Here, Zunum cannot meet its heavy burden to justify any closure of the courtroom during  
 21 trial. Zunum has not even identified the specific information or documents it would seek to seal  
 22 at trial, instead vaguely asserting that it seeks to seal all testimony regarding “Zunum’s  
 23 proprietary technical and business information that is not in the public domain[.]” Dkt. 632 at 1.  
 24 “These conclusory offerings do not rise to the level of ‘compelling reasons’ sufficiently specific  
 25 to bar the public access to the documents[]” or testimony. *Kamakana*, 447 F.3d at 1182.

Moreover, in response to a Court order requiring Zunum to state whether its alleged trade secrets continue to be protected trade secrets to this day, Zunum submitted a verified interrogatory response asserting that many of its alleged trade secrets no longer exist as trade secrets due to their public disclosures by Zunum to other third parties. Dkt. 364, Ex. 113 at Ex. A; *see also* Dkt. 619 at 6–7. As to the remaining alleged trade secrets, Zunum has stated that at least portions of those alleged trade secret have become publicly available in various disclosures. Dkt. 364, Ex. 113 at Ex. A; *see also* Dkt. 619 at 6–7.

Finally, less restrictive means exist to address any confidentiality concerns. For instance, to the extent Zunum is concerned about public access to particular exhibits, it is free to request the sealing of those exhibits on the Court docket. Even if the Court finds that there are compelling justifications for sealing exhibits, it need not close the courtroom at any point during trial. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 2014 WL 12997312, at \*2 (N.D. Cal. June 10, 2014) (finding that parties could introduce under-seal exhibits at trial and but that “[t]he courtroom will not be closed during any discussion or testimony concerning these exhibits”); *Sumotext Corp.*, 2020 WL 836737, at \*4 (“[T]he exhibits [need] not be filed on the public docket[.]”).<sup>2</sup>

### **III. Patent Law Preempts Zunum’s Misappropriation Claim Based on Boeing’s Patents**

In this litigation, Zunum has claimed that Boeing misappropriated its alleged trade secrets by deriving Boeing’s patent inventions from those alleged trade secrets. In light of these claims, Boeing has asserted patent inventorship counterclaims seeking a declaration that, contrary to Zunum’s assertions, the inventors listed on Boeing’s patents are the true inventors. The Court has now granted summary judgment in favor of Boeing on each of Boeing’s patent counterclaims, concluding that, “[b]ased on the court’s review of Zunum’s cited evidence, no

<sup>2</sup> Contrary to Zunum’s assertions, *see* Dkt. 632 3–4, Boeing did not “waive” the right to argue for an open trial by not objecting to the sealing of documents on the Court’s docket, which is an entirely separate question from whether the courtroom ought to be closed during trial.

Zunum engineer claims to be the inventor of one or more claims of either [Boeing] patent.” Dkt. 560 at 28. Despite the Court’s Summary Judgment Order, Zunum has confirmed its intent to argue at trial that Boeing misappropriated its alleged trade secrets in the Boeing patents. Zunum may not do so because the Court already determined—as a matter of federal patent law—that Boeing inventors on the patents are the true inventors. Any contrary claim under state law is preempted.

“If a plaintiff bases its tort action on conduct that is protected or governed by federal patent law, then the plaintiff may not invoke the state law remedy, which must be preempted for conflict with federal patent law.” *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1335 (Fed. Cir. 1998), partially overruled on other grounds *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999); *see also Eagle Harbor Holdings, LLC v. Ford Motor Co.*, 2015 WL 999927, at \*2 (W.D. Wash. Mar. 5, 2015) (“federal patent law preempts any state law that purports to define rights based on inventorship”). A tort action is based on conduct that is “protected or governed by federal patent law” where it alleges, for example, that a defendant “converted . . . [plaintiff’s] valuable technical information by claiming sole ownership in patent applications that matured into [patents.]” *Method Elecs. Inc. v. Hewlett-Packard Co.*, 2000 WL 1157933, at \*2 (N.D. Cal. May 4, 2000). As the court in *Method Electronics Inc.* explained, where a party claims, for example, that the other party “converted . . . [plaintiff’s] valuable technical information by claiming sole ownership in” patent, the claim is preempted by federal patent law. 2000 WL 1157933, at \*2

Here, the Court has already found that Zunum’s trade secret misappropriation claims challenge “the inventorship of” Boeing’s patents. Dkt. 114 at 10. Indeed, Zunum alleges Boeing’s patents “borrow[] heavily from Zunum’s ZA10 architecture,” (Dkt. 60 ¶ 384), i.e., that Boeing included Zunum’s allegedly valuable technical information in its patents. Accordingly, just as in *Method Electronics Inc.*, the “focal point” of Zunum’s patent-based misappropriation theory is whether Boeing misrepresented inventorship in the course of securing its patents, and

that theory is preempted by federal patent law. *Method Elcs. Inc.*, 2000 WL 1157933. Because the Court has already resolved the issue of federal patent law raised by Zunum’s allegations, Zunum should be precluded from pursuing its theory at trial.

**IV. The Washington Uniform Trade Secrets Act Preempts Zunum’s Tortious Interference Claim**

In its opposition to summary judgment, Zunum suggested that Boeing allegedly interfered with its prospective business transactions by misappropriating its alleged trade secrets. Dkt. 481 at 58. While Zunum has attempted to walk back these allegations in its trial brief, it continues to assert that it intends to prove tortious interference by asserting that Boeing “‘used Zunum’s proprietary information’ to support these improper efforts [to interfere with Zunum’s alleged business expectancies].” Dkt. 620 at 9–10. As the Court noted in its Summary Judgment Order: “The ‘improper means’ Zunum discusses are the same as those ‘underlying’ its trade secret misappropriation claim. This raises a possible preemption issue . . . .” Dkt. 560 at 23 n.7. The Court is correct: Because Zunum’s tortious interference claim covers many of the same allegations as its trade secret misappropriation claim, the Washington Uniform Trade Secrets Act (“WUTSA” or “UTSA”) preempts Zunum’s tortious interference claim. *See* Wash. Rev. Code Ann. § 19.108.900(1). Accordingly, even if Zunum’s tortious interference allegations are not entirely preempted, Zunum should be precluded from offering any evidence or argument at trial that Boeing’s purported trade secret misappropriation establishes the “improper means” or “improper conduct” element of its tortious interference claim.

**A. Preemption Applies to Zunum’s Tortious Interference Claim**

The WUTSA “specifically displaces conflicting tort laws pertaining to trade secret misappropriation.” *Ed Nowogroski Ins., Inc. v. Rucker*, 88 Wash. App. 350, 358, 944 (1997), *aff’d*, 137 Wash. 2d 427 (1999); Wash. Rev. Code Ann. § 19.108.900(1) (the WUTSA “displaces conflicting tort, restitutionary, and other law of this state pertaining to civil liability for misappropriation of a trade secret”). Under the fact-based approach to deciding preemption,

1 articulated in *Thola v. Henschell*, 140 Wash. App. 70 (2007), “[t]here is a “three-step analysis to  
 2 determine whether a claim is preempted: (1) assess the facts that support the plaintiff’s [non-  
 3 UTSA] civil claim, (2) ask whether those facts are the same as those that support the plaintiff’s  
 4 UTSA claim, and (3) hold that the UTSA preempts liability on the civil claim unless the  
 5 common law claim is factually independent from the UTSA claim.” *T-Mobile USA, Inc. v.*  
 6 *Huawei Device USA, Inc.*, 115 F. Supp. 3d 1184, 1198 (W.D. Wash. 2015) (citing *Thola*, 140  
 7 Wash. App. at 82); *Ed Nowogroski Ins., Inc.*, 88 Wash. App. at 358 (a plaintiff “may not rely on  
 8 acts that constitute trade secret misappropriation to support other causes of action.”); *Petters v.*  
 9 *Williamson & Assocs., Inc.*, 115 Wash. App. 1047 (2003) (“The Uniform Trade Secrets Act has  
 10 displaced the common law” for claims for “unfair competition by misappropriation.”).

11 Zunum argues that because its tortious interference claim has different elements than its  
 12 misappropriation claim, preemption is inapplicable in light of another Washington Court of  
 13 Appeals decision in *SEIU Healthcare Nw. Training P’ship v. Evergreen Freedom Found.*, 5  
 14 Wash. App. 2d 496, 507 (2018). But *SEIU* could not—and did not—overrule *Thola* and its  
 15 progeny. Rather, in *SEIU*, the panel based its decision to apply an elements-based approach on a  
 16 misinterpretation of an earlier Washington Supreme Court decision in *Boeing Co. v. Sierracin*  
 17 *Corp.*, 108 Wash.2d 38, 48 (1987). But in *Boeing*, the Washington Supreme Court considered  
 18 only preemption of **contract** claims—not **tort** claims like those at issue here. In fact, as the  
 19 *Boeing* court emphasized, the legislative history shows that WUTSA preemption was specifically  
 20 intended to apply to tort claims, as opposed to contract claims, despite the fact that tort claims  
 21 have different elements than a WUTSA misappropriation claim. *Boeing*, 108 Wash.2d 38 at 48  
 22 (quoting legislative history, “It is the judgement of the Committee that ***the answer still should be***  
 23 ***no [that the Act cover contract liability], and that the Act limit itself to the tort situation.***”  
 24 (emphasis added)). As such, *SEIU* does not control, and *Boeing* involved a separate issue.

25 Indeed, courts after *SEIU* have applied *Thola*’s reasoning to find preemption of tort  
 26 claims based on the same facts as a WUTSA misappropriation claim (but with different

elements). *See Caliber Home Loans, Inc. v. CrossCountry Mortg., LLC*, 2023 WL 2711546, at \*5 (W.D. Wash. Mar. 30, 2023) (“The framework set forth by the Washington Supreme Court mandates that a conversion claim is preempted by UTSA if plaintiff actually asserts a UTSA claim.”); *NW Monitoring LLC v. Hollander*, 534 F. Supp. 3d 1329, 1338–39 (W.D. Wash. 2021) (“[A] plaintiff ‘may not rely on acts that constitute trade secret misappropriation to support [another cause] of action’ even if it requires proof of additional elements.” (citations omitted)); *tinyBuild LLC v. Nival Int’l Ltd.*, 2020 WL 13803810, at \*1 (W.D. Wash. May 18, 2020) (“[P]laintiff’s claim for conversion is preempted by Washington’s Uniform Trade Secrets Act.”). This view is consistent with “the majority of UTSA jurisdictions,” *Thola*, 140 Wash. App. at 82, and Washington’s mandate to construe UTSA “to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it,” Wash. Rev. Code Ann. § 19.108.910.

While Zunum argues that this Court already found that *SEIU* controls, this is inaccurate. In *Convoyant LLC v. DeepThink, LLC*, the Court certified to the Washington Supreme Court the question of whether a fact-based approach under *Thola* or an elements-based approach under *SEIU Healthcare* applied to preemption under Wash. Rev. Code Ann. § 19.108.900(1). 2021 WL 5810638, at \*7 (W.D. Wash. Dec. 7, 2021). Ultimately, the Washington Supreme Court declined to resolve the certified question because the parties “agree[d] that a fact-based approach should be used[.]” *Convoyant*, Case No. 2:21-cv-0310-JLR, Dkt. 33; *Convoyant LLC v. Deepthink, LLC*, 200 Wash. 2d 72, 74 (2022) (same).

Consequently, under the fact-based approach, Zunum’s allegations that Boeing interfered with Zunum’s alleged business expectancies through improper means because it “used Zunum’s proprietary information,” Dkt. 481 at 58, are preempted. Zunum should therefore be prohibited from introducing any evidence or argument that Boeing’s purported trade secret misappropriation satisfies the “improper means” element of its tortious interference claim.

Boeing further respectfully requests that the Court instruct the jury not to consider any evidence of alleged misappropriation when deliberating on Zunum's claim for tortious interference. *See Thola*, 140 Wash. App. at 84–85 (stating that “[p]arties are entitled to jury instructions that accurately state the law”; “the trial court failed to instruct the jury on preemption” and “thus, did not accurately state the law governing the jury’s decision”; and “[u]pon retrial, the trial court must properly instruct the jury on preemption and the limited use of trade secret appropriation evidence”).<sup>3</sup>

### **B. Boeing Has Not Waived Its Preemption Defense**

Zunum asserts that Boeing “waived” its preemption defense over Zunum’s shifting tortious interference allegations. Dkt. 620 at 7-9. But “[w]here a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless.” *Mahoney v. Tingley*, 85 Wash. 2d 95, 100 (1975). The Ninth Circuit has held “that a defendant’s failure to raise an affirmative defense in its answer does not necessarily waive the defense.” *Strategic Diversity, Inc. v. Alchemix Corp.*, 2013 WL 4511971, at \*11 (D. Ariz. Aug. 28, 2013) (citing *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001)). “The defense may be raised later if the delay in raising it does not prejudice the plaintiff.” *Id.* (citing *Owens*, 244 F.3d at 713); *Equal Emp. Opportunity Comm’n v. AN Luxury Imports of Tucson Inc.*, 2014 WL 11662998, at \*2 (D. Ariz. Oct. 17, 2014) (acknowledging that defendants “did not waive” affirmative defense that “was raised for the first time in the

<sup>3</sup> Boeing provides the following proposed jury instruction:

Zunum asserts claims for trade secret misappropriation and tortious interference with business expectancies. The law prohibits Zunum from using evidence of alleged trade secret misappropriation to prove that Boeing and HorizonX tortiously interfered with any business expectancies. As such, you may not consider evidence of alleged trade secret misappropriation when deliberating on Zunum’s claim for tortious interference with business expectancies.

*Thola v. Henschell*, 140 Wash. App. 70, 84–85 (2007).



1 defendants' trial brief that was filed on the first day of the bench trial." (citing *Strategic*  
2 *Diversity, Inc. v. Alchemix Corp.*, 2013 WL 4511971, at \*11 (D. Ariz. Aug. 28, 2013)).

3 Here, Zunum has not even attempted to argue that it would be prejudiced. *See generally*  
4 Dkt. 620 at 7–10. Nor could it. Granting Boeing's request for preemption would merely narrow  
5 and streamline the presentation of evidence, and "[n]o additional discovery would be necessary  
6 as a result of the amendment." *Bagdasaryan v. Los Angeles*, 2020 WL 5044192, at \*4 (C.D. Cal.  
7 Jan. 19, 2020) ("there is no prejudice to Plaintiffs from permitting Defendant to amend its  
8 answer"); *Finmeccanica S.p.A. v. Gen. Motors Corp.*, 2008 WL 11336141, at \*5 (C.D. Cal. Dec.  
9 17, 2008) (declining to find waiver of preemption defense); *Salazar v. Driver Provider Phoenix*  
10 *LLC*, 2023 WL 167021, at \*2 (D. Ariz. Jan. 12, 2023) ("The Court finds that allowing Plaintiffs  
11 to amend the Complaint [to add preemption defense] will resolve any prejudice[.]").



Dated: May 14, 2024

Respectfully submitted,

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